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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/731,935	12/09/2003	Mariana Tajada	14552.0001US01	6657
23552	7590	01/10/2007	EXAMINER	
MERCHANT & GOULD PC			WARE, DEBORAH K	
P.O. BOX 2903			ART UNIT	PAPER NUMBER
MINNEAPOLIS, MN 55402-0903			1651	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/10/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)
	10/731,935	TAJADA, MARIANA
	Examiner	Art Unit
	Deborah K. Ware	1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 23 October 2006.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1, 4-5, 12-24 is/are pending in the application.
- 4a) Of the above claim(s) 5, 12 and 17-22 is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1, 4, 13-16, 23 and 24 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 12/9/03 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)	5) <input type="checkbox"/> Notice of Informal Patent Application
Paper No(s)/Mail Date _____	6) <input type="checkbox"/> Other: _____

DETAILED ACTION

Claims 1, 4-5, and 12-24 are presented for reconsideration on the merits.

Drawings

Color photographs and color drawings are not accepted unless a petition filed under 37 CFR 1.84(a)(2) is granted. Any such petition must be accompanied by the appropriate fee set forth in 37 CFR 1.17(h), three sets of color drawings or color photographs, as appropriate, and, unless already present, an amendment to include the following language as the first paragraph of the brief description of the drawings section of the specification:

The patent or application file contains at least one drawing executed in color. Copies of this patent or patent application publication with color drawing(s) will be provided by the Office upon request and payment of the necessary fee.

Color photographs will be accepted if the conditions for accepting color drawings and black and white photographs have been satisfied. See 37 CFR 1.84(b)(2).

Response to Amendment

The amendment and extension of time filed October 23, 2006, have been received and entered. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Foreign Priority

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Election/Restrictions

Claims 5, 12 and 17-22 remain withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention(s), there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on November 8, 2004. It is noted that Applicants have presently also withdrawn these claims pending rejoinder. Claim 11 was previously canceled. Claims 17-22 were newly added and have been withdrawn as indicated above.

Thus, claims 1, 4, 13, 14, 15, 16, and 23-24 are reconsidered on the merits.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 13 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 13 recites "The medium" and it appears that the term "the medium" may lack antecedent basis because in other instances of the claims "the culture medium" is

used to refer back to "A culture medium" as recited in claim 1. Use of consistent terms is suggested in all of the claims.

Special Note

Note that subject matter of claims 23-24 were discussed in the prior rejection but were inadvertently not included in the preamble of the rejection and thus, correction to the previous preamble of the prior art rejection is submitted below.

Claim Rejections - 35 USC § 103

Claims 1, 4, 13 and 23-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over JP360196185A in view of Gottlieb et al (US Patent No. 3,188,272), Chun et al (US 5089394) and Liao et al (US 5437997), all cited of record.

Claims are drawn to culture medium comprising various amounts of monobasic potassium phosphate, ammonium chloride, heptahydrate magnesium sulfate, saccharose and water for culturing yeast or fungi. Further the yeast may be selected from *Saccharomyces cerevisiae*. The pH can range from 4.5 to 5.5 and culture medium is contained in a culture plate which can comprise an absorbent surface.

JP Patent teaches culturing *Saccharomyces cerevisiae* in a culture medium which comprises ammonium chloride, magnesium sulfate, and saccharose, see the abstract.

Gottlieb teaches culture medium comprising monobasic potassium phosphate and water for detecting yeast (*Saccharomyces*). Note column 9, lines 6 and 12. The culture medium is contained in a culture plate, note column 2, line 20. The pH can be between 2.3 and 10.4, note column 5, line 30.

Chun et al teach a detection system wherein an absorbent surface is disclosed to be comprised by a culture container, note bridging columns 3-4, lines 65-68 and 1-10, respectively.

Liao et al teach a culture medium comprising monobasic potassium phosphate in an amount of about 4.5 g/l, column 11, lines 37-41 and line 56 and heptahydrate magnesium phosphate at column 12, line 16. Also at column 10, lines 29-40, a comparable carbohydrate source is disclosed in an amount of about 40 g/l. Further, at column 11, lines 18-19, line 59 and line 62, nitrogen and sulfate sources, respectively, are disclosed to be only effective at least about 1.5 g/l.

The claims differ from JP Patent abstract in that monobasic potassium phosphate and heptahydrate magnesium sulfate are not disclosed.

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine the teachings of JP Patent, Gottileb, newly cited Chun et al, and newly cited Liao et al in order to provide for a culture medium comprising monobasic potassium phosphate, ammonium chloride, magnesium sulfate, saccharose and water for culturing yeast since all of the ingredients for the culturing and testing are disclosed by the cited prior art. One of skill in the art would have been motivated to combine these disclosed ingredients together in a culture medium because they are taught to be used for culturing yeast. Further, as noted above by Gottileb the pH range of 4.5 and 5.5 is well known to be selected for culture medium fermentations.

Thus, one of skill in the art would have expected successful results by their combination together in a culture medium. Furthermore, Gottileb teach that yeast (i.e.

Saccharoymyces cerevisiae) can be cultured at a pH of 2.3 and 10.4, note column 5, line 30. The culture medium and/or composition thereof would have been expected to be useful for food industry installations because the yeast would have been expected to grow on the culture media so disclosed by the cited prior art and thus, their detection in the installations realized via their growth thereupon the culture medium as disclosed by the cited prior art. Also the selection of the specified amounts in new claim 14 are clearly taught, or at least suggested, by the newly cited reference Liao et al, noted above. To contain the culture medium in a plate is taught and the newly cited Chun et al clearly teach that use of an absorbent surface as being comprised by a culture container is well known. The claims are rendered *prima facie* obvious over the cited prior art.

Response to Arguments

Applicant's arguments filed October 23, 2006, have been fully considered but they are not persuasive. The argument that new claims are directed to a minimal media is noted, however, art has been set forth for which to meet these additional ingredients added to make up the alleged minimal media, however, the claims do not recite "minimal media" but the ingredients make up this media of which Applicants' alleges criticality, therefore.

Furthermore, the usage of the term "consisting" is noted, however, each of the ingredients useful in the claimed culture medium are disclosed in the cited prior art and to combine these ingredients together is suggested by the cited prior art, especially since no specific amounts of the ingredients are required and hence any useful amounts

can be selected and used and this would suggest to one of skill in the art that any useful well known ingredients for the same purpose would have been successful. It would have been obvious to exclude other sources (i.e. peptide, peptone, yeast extract, etc.) of nitrogen when ammonium chloride is present. In addition the origin from which the ingredients are obtained are not relevant since it is not even claimed. Also Applicants direct the Examiner to page 3 of the instant specification, however, this only further supports the Examiner's argument that critical amounts are not required by the art-rejected claimed subject matter.

Each of the cited references teach a culture medium for culturing a microorganism of which at least two are culturing yeasts. This is the very same microorganism required by the claimed medium and one of skill would have been motivated by one of skill in the art to select for these ingredients to formulate a culture medium for culturing yeasts. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning or a *reconstruction*, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In addition, Applicant's claims do not necessarily require any particular type of microorganism or any microorganism, for that matter, to be in the culture medium per

se. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

The cited prior art combination against the claims clearly teach that these ingredients have been included in the culture medium for yeast, thus whether or not other ingredients can be used but are not by Applicants' claims is not deemed persuasive because each have been independently selected for use in a culture medium and this alone suggests that each will function effectively for a successful culture medium. Applicants have provided no evidence on the record which shows that these ingredients have not been successfully used in a culture medium. Therefore, in the absence of persuasive evidence to the contrary the claims are deemed *prima facie* obvious over the cited prior art of record.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Conclusion

Art-rejected claims fail to be patentably distinguishable over the state of the art discussed above and cited of record. Claims not rejected over art are objected to for being dependent upon a rejected base claim. Therefore, the claims are properly rejected.

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is 571-272-0924. The examiner can normally be reached on 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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Deborah K. Ware
January 6, 2007


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PRIMARY EXAMINER
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